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No. 1063

In the Supreme Court of the United States

OCTOBER TERM, 1967

OHIO VALLEY GAS CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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Prior to January 1, 1966, petitioner purchased natural gas from American Louisiana Pipe Line Company under that pipeline's Small General Service ("SGS") Rate Schedule (J.A. 26). According to the terms of this schedule, petitioner could purchase up to 6,000 Mcf per day (J.A. 25–26). On January 1, 1966, American Louisiana merged into Michigan-Wisconsin Pipe Line Company.[1] In addition to its own SGS schedule, Michigan-Wisconsin offered an Annual Contract Quantity ("ACQ–1") schedule which allows the customer each year 190 times his Maximum Daily Quantity

[1] Both pipeline companies were wholly owned subsidiaries of American Natural Gas Company.

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(MDQ). The customer is entitled to purchase his full MDQ on any day during the winter months of November through February, 85% of his MDQ from March 1 through March 15, and 75% of his MDQ from March 16 through October 31 (J.A. 1–2, 8). The rate under this schedule was 27.65¢ per Mcf, plus a fixed monthly charge (J.A. 2). For the period involved here, this price was lower than the 44.6¢ per Mcf price under the SGS schedule (J.A. 9). In addition, penalties were provided for unauthorized overruns.[2]

Petitioner concluded that during the winter months it required 750 Mcf per day over the 6,000 Mcf allowed under the SGS schedule. It therefore entered into an agreement to purchase its gas under Michigan-Wisconsin's ACQ-1 Schedule, effective as of January 1, 1966 (J.A. 18–21).

On January 12, 1966, Michigan-Wisconsin filed a motion with the Federal Power Commission to amend its certificate to approve the new service agreement effective as of January 1, 1966 (J.A. 12–13). The motion was served on all Michigan-Wisconsin customers including petitioner, and on the various interested State commissions (J.A. 13–18). No one protested or sought intervention. On March 14, 1966, the Commission granted the motion, except that it made the agreement effective as of the day its order was issued, March 14, 1966 (J.A. 23–25).

Since petitioner had not intervened and, therefore, was not a party, no notice of this action was given it

[2] Penalties are imposed because if one purchaser takes extra volumes, another purchaser down the line may not receive its full entitlement.

by the Commission. See Section 1.30(i) of the Commission's Rules of Practice, 18 CFR 1.30(i). Michigan-Wisconsin also gave no notice to petitioner. During various days in March and April 1966, petitioner took a total of 3,334 Mcf over the 5,062.5 Mcf its ACQ Schedule allowed between March 16 and October 31 (J.A. 28). These excess volumes were billed at the $10 per Mcf penalty in addition to the regular cost, for a total penalty of $33,340 (J.A. 4, 28). Petitioner became aware of the Commission's March 14 order on April 14, 1966, when it received the billing from Michigan-Wisconsin for its March purchases in the total amount of $137,786.54 (J.A. 36, 44–45). It then modified its operations to comply with the ACQ limits.

On September 1, 1966, petitioner requested the Commission to authorize and direct Michigan-Wisconsin to waive the penalties (J.A. 26). Michigan-Wisconsin did not object to some relief, but asserted that it would be inappropriate both to waive the penalties and, as petitioner desired, still allow the lower basic rate of the ACQ schedule (J.A. 31–32). The Commission agreed and approved as equitable Michigan-Wisconsin's proposal to make the new service agreement effective as of April 14, 1966, treating sales prior to that time as made under the SGS schedule (J.A. 32).

Petitioner filed, and the Commission denied, a timely petition for rehearing (J.A. 39–43). On review, the Court of Appeals for the District of Columbia Circuit affirmed *per curiam*.

The decision below does not conflict with this Court's holdings in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line*

Co. v. *Memphis, Light, Gas and Water Division,* 358 U.S. 103, that a natural gas company may not unilaterally file an increased rate that is contractually unauthorized. Here, as petitioner acknowledges (Pet. 7), the new service agreement, which made the ACQ rate schedule applicable, was contractually authorized when it was filed. The Commission acted lawfully and equitably in relieving petitioner of a contract that caused penalties to accrue where petitioner had failed to take steps to guarantee that it had notice. It would be curious indeed if the Commission, while relieving petitioner of the penalties for which the contract called, was legally bound to grant petitioner the advantages of the lower price of the ACQ schedule. In sum, the decision below is clearly correct and the case is in no event of sufficient general importance to warrant review in this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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